QUESTION PRESENTED

Whether a law enforcement officer may ask questions limited to clarifying a suspect's wishes when the suspect makes an ambiguous comment regarding counsel during a custodial interrogation.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1949

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-11a, is reported at 36 M.J. 337. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 12a-15a, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 11, 1993. The petition for a writ of certiorari was filed on June 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner Davis, a member of the United States Navy, was convicted at a general court-martial on one specification of unpremeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank to pay grade E-1. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. Pet. App. 12a-15a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-11a.

1. On the evening of October 2, 1988, Seaman Keith Shackleton played pool with petitioner in the Enlisted Mens' Club at the United States Naval Base, Charleston, South Carolina. Tr. 583, 606, 619-620, 639-641, 714, 728, 746-747. Shackleton lost the game and a $30 wager, but he refused to pay. After the club closed, petitioner killed Shackleton by beating him with a pool cue on the loading dock of the commissary, a short distance from the club. Tr. 714, 728, 746-747. Shackleton's body was found early the next morning by a milk delivery man. Tr. 662.

In the first stage of the ensuing investigation, some 150-250 sailors were interviewed, including petitioner. Tr. 136. During petitioner's first interview on October 20, 1988, petitioner said that he was at the Enlisted Mens' Club playing pool on the night of the murder. AXs 28, 36; Tr. 165, 792-796. Petitioner said that he recognized a photograph of Shackleton and believed that he had played pool with him. Tr. 792-796. He also said that two individuals named Wade Bielby and Bonnie Krusen had told him about Shackleton's

murder just three days after it happened and had told him that Shackleton had been "beaten with a pool stick." Tr. 65, 792-796.[1] At the end of the interview, petitioner agreed to turn his pool cues over to the Naval Investigative Service (NIS) agents. *Ibid.*[2] While surrendering his two pool cues and their case, petitioner pointed out a stain that he said he thought was either his blood or catsup. AX 28; PX 7; Tr. 795-796.

As the investigation continued, NIS agents discovered that shortly after Shackleton's murder, petitioner told several fellow sailors that he had committed the crime. Petitioner's account of the murder involved details of the crime that only the murderer would have known, or otherwise clearly indicated that he had been involved in the murder. For example, on October 5, 1988, in a conversation that petitioner had with Petty Officer David Guidry, Guidry said he had heard that Shackleton had died by falling and injuring his head. Petitioner corrected Guidry, stating that Shackleton had been "beat up and stuck with a pool cue." Tr. 269-270, 702. In addition, on October 27, petitioner told Petty Officer Ronald Mull that NIS was investigating petitioner for the murder of the man killed behind the commissary. Tr. 746. When asked directly if he did it, petitioner told Mull, "Yes, I did." *Ibid.* Petitioner told Mull that he

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[1] Both Krusen and Bielby testified that they had not discussed Shackleton's murder with petitioner during that time period. Tr. 852-853, 855.

[2] NIS agents had been looking for people who owned their own pool cues based on preliminary indications that Shackleton's injuries were consistent with being struck by a pool cue. Tr. 118, 123. NIS obtained cues from several individuals during the investigation. Tr. 125.

was playing pool at the Enlisted Mens' Club and "beat the guy out of $30.00" and that the "guy" did not want to pay. Tr. 747. The two had an argument, and they ended up outside the club. *Ibid.* Mull testified that petitioner related the following, *ibid.*:

> He said that he hit the guy with a pool—his pool stick a couple of times and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. He said—I don't know exactly where he was at, but he said that he drug the guy's body behind the commissary and then he said he ran down into the woods and left the base somehow. * * * He said he went to a girlfriend's house. * * *

Petitioner told Mull that he had an alibi; he was seen by several people with "some girl" at the club. Petitioner also said that NIS had taken his pool cues and that one of them had a blood stain that he had tried to wash off and erase with sandpaper. Petitioner said he was not worried, however, because he had the same blood type as the victim. *Ibid.*[3] Petitioner also made various other, similar incriminating statements.[4]

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[3] Petitioner was wrong. His blood type is B; Shackleton's was O. Tr. 907, 908, 914.

[4] On October 19, 1988 (the day before NIS first interviewed petitioner), petitioner told Petty Officer Steven Brothers that he had been accused of murder. Tr. 274, 707. When Brothers asked why, petitioner said that the authorities had found someone dead on the base, that he had played pool with the victim the night before, and that the authorities were accusing him of beating the victim with a pool cue. Tr. 274, 708.

One day in October 1988, petitioner told Petty Officer Richard Kuhn that NIS had taken his pool cues because he had played pool with this "guy." Petitioner also stated that the "guy" owed him money after the game but did not pay, so petitioner hit him over the head with a pool cue. Tr. 288, 714. Petitioner also told Kuhn that he did not know whether the victim had died, and that he did not care. *Ibid.*

In mid-October 1988, when asked why he was not playing pool, petitioner told Petty Officer Walter Crayton Black that NIS had taken his pool cues. Tr. 272, 728. Petitioner explained that someone had been killed on the base, that he had been playing pool with him, that he was the last one seen with him at the Enlisted Mens' Club, and that he had won $30 from the victim but had no reason to be involved in the murder. *Ibid.*

With those statements in hand, NIS agents arrested petitioner on November 4. Tr. 295.[5] After receiving the appropriate warnings both orally and in writing, petitioner agreed to talk with two NIS agents. AXs 37, 38, 40; Tr. 295-296, 324-325. When asked if he wanted to have a lawyer present, petitioner specifically declined. AX 40; Tr. 295.

During the first part of the interview, petitioner described his activities during October 1 and 2, 1988. AXs 38, 40; Tr. 957-958. Specifically, petitioner stated that he was at the Enlisted Mens' Club with his girlfriend. He said he may or may not have played pool, but that he always has his pool cues with him. *Ibid.* Petitioner said that he subsequently went to an off-base nightclub called "J.W.'s" and then to his girlfriend's house. *Ibid.*

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[5] Petitioner was arrested as he was released from a psychiatric evaluation that his command had ordered because he had made statements on March 3, 1988, to the effect that he wanted to kill someone just to see what it was like. AX 31; Tr. 207-208, 1102-1103. In addition, he also told his division officer on October 20, 1988, that he felt like shooting someone, "[b]etter yet, a cop because then I know [they] will kill me." AX 33; Tr. 775. The latter statement was not admitted at trial. *Ibid.*

The NIS agents confronted petitioner with his girlfriend's statement that she was not at the Enlisted Mens' Club that night. Tr. 958-959. Petitioner then changed his story, saying that he was at the Enlisted Mens' Club with some friends. AXs 38, 40; Tr. 959. NIS then confronted petitioner with a statement indicating that he had won $30 playing pool with Shackleton. AXs 38, 40; Tr. 960. Petitioner denied playing pool with Shackleton and denied winning $30. *Ibid.* Petitioner explained the presence of a bloody t-shirt in his locker as the result of the extraction of wisdom teeth.[6]

About 80 minutes into the interview, petitioner said, "Maybe, I should talk to a lawyer." AXs 38, 40; Tr. 297, 304, 309, 324. The agents immediately stopped all questioning of petitioner and sought to clarify his request. Specifically, as Special Agent Sentell testified:

> [I] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it.

Tr. 310; see also Tr. 307, 313, 315, 316, 324-325, 331-332.

[6] The extraction was confirmed by petitioner's oral surgeon and by forensic testing establishing that petitioner's blood, not the victim's, was on the t-shirt. DX K; Tr. 1260-1261.

After confirming that petitioner did not want a lawyer, the agents recessed for a short break. Tr. 297, 304. Petitioner was asked if he wanted a drink or a cigarette. Tr. 297, 303, 329.[7]

At the beginning of the second portion of the interview, Special Agents Clark and Sentell reminded petitioner that he still enjoyed the rights about which he previously had been advised. Tr. 304-305, 329. Petitioner began to discuss a conversation that he had had with Petty Officer Guidry, during which he told Guidry that the man who died behind the commissary had been killed with a pool cue. When asked why he said that, petitioner said he liked to "mess" with people and make them think he knew more than they knew. AXs 38, 40; Tr. 961. When asked why he said that the man had been "hit and jabbed," petitioner said that he had added that detail in order to make his description sound more realistic. Petitioner then changed his story, stating that Bielby had told him the details about the pool cue. *Ibid.*

Petitioner said that he knew who had killed Shackleton, and he named one "Jeff Kaiser." AXs 38, 40; Tr. 961. Petitioner's basis for that opinion was that Kaiser did not go to the club for almost a month after the murder because Kaiser was scared and because he had been "doing acid" that night and may have done something he did not remember. *Ibid.* Petitioner finally said that if he had killed someone, he would have had to tell somebody. AX 40; Tr. 961. The NIS agents then confronted petitioner with the fact that he *had* told someone, and that individual had

[7] Petitioner also used the bathroom once during the interview. Tr. 333.

provided a sworn statement to NIS. Tr. 316. At that point, petitioner said, "I think I want a lawyer before I say anything else." The agents immediately terminated the interview. Tr. 310-311; see also AX 40; Tr. 307, 312-314, 316, 332.

2. Before trial, petitioner moved to suppress his statements. AX 9, No. 20. The trial judge held an evidentiary hearing on the motion. The government's witnesses testified that petitioner had been properly advised of his rights; that during the questioning he made an ambiguous statement regarding counsel; that the NIS agents ceased their questioning once petitioner made that statement; that petitioner then denied wanting to speak with counsel; and that when petitioner later asked to speak to an attorney, all questioning ceased. Petitioner gave a different version of the events.[8]

After the hearing, the trial judge denied petitioner's motion. Specifically, the trial judge determined, Tr. 342:

[8] According to petitioner, the agents "were talking to me, and I said, 'Well, I'd like a lawyer,' and they said, 'We'll take a break,' and they walked out and left me handcuffed to the chair." Tr. 319. Petitioner said that later "[t]hey came back in and started questioning me again." *Ibid.* Petitioner indicated that, notwithstanding the fact that he understood he had a right to a lawyer, he didn't pursue getting a lawyer when questioning began again because he "really did not understand * * * what was going on." Tr. 321. Petitioner stated that he asked for a lawyer again later using the same words, "I want a lawyer," at which time questioning stopped for the most part. Tr. 321-322. Based on that evidence, petitioner argued that the government had not established a valid waiver of rights at the initiation of the interview and that he had requested and been denied counsel during the interview, in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Tr. 338-340.

> I think that pursuant to Military Rule of Evidence 304 that the accused was properly advised of his rights pursuant to Article 31 and the cases of *Miranda* and *Tempia*, and that he intelligently and freely waived those rights. Moreover, I find that the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel. The motion to suppress the 4 November '88 statement is accordingly denied.

3. The Navy-Marine Corps Court of Military Review unanimously affirmed the findings and sentence. Pet. App. 12a-15a. Without comment, the court rejected the error raised here, among others, as meritless.

4. The Court of Military Appeals affirmed. Pet. App. 1a-11a. The court determined that petitioner had made only a "vague" or "ambiguous" reference to counsel and that it "required clarification." *Id.* at 10a. Following the majority of other federal courts that have considered this question, the court held that law enforcement authorities may make limited inquiries in order to clarify such an ambiguous reference to counsel by a person who is being subjected to a custodial interrogation. *Ibid.* Applying that rule to the facts of this case, the court found that the NIS agents' inquiries were appropriately limited to that purpose, and that their conduct did not interfere with petitioner's right to counsel under *Miranda*. *Id.* at 10a-11a.

ARGUMENT

Petitioner urges this Court to grant certiorari to decide whether a law enforcement officer may make a limited inquiry of a suspect who has made an ambiguous remark about counsel during a custodial interrogation in order to clarify whether the suspect wishes the assistance of counsel. While we agree with petitioner that there is some disagreement among the lower courts on this question, *Mueller* v. *Virginia*, 113 S. Ct. 1880, 1881 (1993) (White, J., dissenting from the denial of certiorari), there is no need for the Court to resolve that disagreement here.

As this Court has noted, the lower courts have taken three approaches to determining whether law enforcement officers may question a suspect if he has made an ambiguous reference to counsel during custodial interrogation. The approaches are: (1) to require the officers to cease all questioning once a suspect refers to counsel, however ambiguous that reference may be; (2) to require the officers to cease further interrogation, but to allow them to ask the suspect questions limited to clarifying his desires with respect to counsel; and (3) to permit the officers to continue the interrogation until the suspect makes an unambiguous request for an attorney. *Smith* v. *Illinois*, 469 U.S. 91, 95-97 n.3 (1984).

In this case, the Court of Military Appeals approved the use of limited, clarifying questions when a suspect makes an ambiguous reference to a lawyer. That approach accommodates the interests of suspects and law enforcement. It vindicates a suspect's interest in avoiding the type of police badgering that is the justification for the bright-line rule of *Edwards*, see *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991); *Minnick* v. *Mississippi*, 498 U.S. 146, 150 (1990); *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion), without requiring him to state with precision that he wishes to consult with an attorney before further questioning. At the same time, it permits law enforcement officers to undertake a reasonable inquiry in order to discern what a suspect truly desires once he makes an ambiguous reference to an attorney. Cf. *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975) ("a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.").[9] It is a mistake to assume that every suspect's ambiguous reference to an attorney indicates a desire to deal with the police only through a lawyer. As the en banc Fifth Circuit has observed: "While the suspect has an absolute right to terminate station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice. Some persons are moved by the desire to unburden themselves [by] confessing their crimes

[9] Notably, even in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court recognized that a suspect's invocation of his rights might be equivocal. The Court cited with approval practices of the FBI relayed to the Court in a letter from Solicitor General Thurgood Marshall: "If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must be necessarily left to the judgment of the interviewing Agent." 384 U.S. at 485.

to police, while others want to make their own assessment of what to say to their custodians." *Nash* v. *Estelle*, 597 F.2d 513, 517 (en banc), cert. denied, 444 U.S. 981 (1979). For those reasons, it is unsurprising that the majority of the federal courts of appeals that have addressed this issue have endorsed the common-sense approach approved by the Court of Military Appeals in this case. See, *e.g.*, *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.), cert. denied, 113 S. Ct. 436 (1992); *United States* v. *Gotay*, 844 F.2d 971, 975 (2d Cir. 1988); *United States* v. *Fouche*, 776 F.2d 1398, 1405 (1985), appeal after remand, 833 F.2d 1284, 1287 (9th Cir. 1987), cert. denied, 486 U.S. 1017 (1988); *United States* v. *Porter*, 776 F.2d 370 (1st Cir. 1985) (en banc); *Nash* v. *Estelle*, 597 F.2d 513, 517 (5th Cir. 1979); cf. *United States* v. *Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976).

The Sixth Circuit adopted a contrary rule in *Maglio* v. *Jago*, 580 F.2d 202, 205 (1978), where it held that law enforcement officers must halt all questioning of any type of a suspect who has made even an ambiguous reference to counsel. There is no need, however, to resolve the disagreement between *Maglio* and the rule in the other circuits. The Sixth Circuit adopted its rule before this Court decided *Oregon* v. *Bradshaw*, *Michigan* v. *Harvey*, *Minnick* v. *Mississippi*, and *McNeil* v. *Wisconsin*. In each of those cases this Court made clear that the justification for the bright-line rule of *Edwards* v. *Arizona* was the need to prevent the police from badgering a suspect into waiving his right to counsel. The limited type of inquiry approved by the Court of Military Appeals in this case and by the majority of the federal courts of appeals is not likely to lead to the type of badgering with which this Court was concerned in *Edwards*. It

therefore is appropriate to afford the Sixth Circuit the opportunity to revisit the question before this Court undertakes to answer it.

Following that course will not prejudice petitioner, because his conviction would be upheld regardless of the approach endorsed by this Court. The reason is that any error in the admission of the statements that petitioner made after his ambiguous reference to counsel was harmless beyond a reasonable doubt.

The statements that petitioner made after his ambiguous reference to a lawyer were inconsequential. After that point in questioning, petitioner merely repeated what he had previously told the NIS agents about his October 5 conversation with Petty Officer Guidry about how Shackleton had died. In addition, petitioner asserted that a "Jeff Kaiser" had killed Shackleton. See AXs 38, 40; Tr. 961. Those limited and basically non-inculpatory remarks consisted of less than half a page of testimony in a trial record that was more than 700 pages in length.

That evidence was insignificant when compared to the proof of petitioner's guilt adduced at trial. For example, the government presented five witnesses who placed both petitioner and Shackleford at the Enlisted Mens' Club on the night of the murder. Tr. 579-585, 606-607, 619-620, 639-641, 648. Forensic evidence also tied petitioner to the crime. A forensic chemist, Judith Flynn, testified that petitioner's blood type was B and that Shackleton's was O. PX 21; Tr. 907, 914. Flynn found blood of the victim's type on petitioner's pants and spots of blood on petitioner's tennis shoes. PX 23; Tr. 911-912. A human blood stain also was found on petitioner's pool cue case. PX 21; Tr. 906. Moreover, at various times petitioner made statements to fellow sailors in which he either

specifically admitted assaulting Shackleton, or otherwise clearly implicated himself in that crime. Lieutenant Moss and Petty Officers Guidry, Stephen Brothers, Scott Richard Kuhn, and Walter Crayton Black recounted petitioner's various incriminating statements. Petty Officer Ronald Mull also retold petitioner's confession in which he admitted murdering Shackleton because Shackleton had reneged on a wager. Tr. 702, 707-708, 714, 728, 746-747, 1103. Petitioner also gave the NIS agents false exculpatory statements when he said that he had learned about the facts of the crime from one Everett Wade Bielby and one Bonnie Krusen, neither of whom spoke with petitioner during the relevant period, and when he said that he had spent the night of the murder with his girlfriend, who denied that claim. Tr. 852-853, 855, 957-958.

In sum, the record evidence overwhelmingly establishes that petitioner beat Keith Shackleton with a pool cue, causing him to fall and suffer fatal head injuries. Admission of the one-half page of non-inculpatory information obtained after petitioner's comment about counsel could not have had a material effect on the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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